BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIZABETH M. OLSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,030,037
HUTCHINSON HOSPITAL CORPORATION	)	
Self-Insured Respondent	)	

ORDER

Claimant appeals the January 22, 2009, Award of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was denied an award in the above matter after the ALJ determined that claimant had failed to prove that she suffered an accidental injury or occupational disease which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, James S. Oswalt of Hutchinson, Kansas. Respondent appeared by its attorney, Kendall R. Cunningham of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The parties originally raised an issue dealing with claimant's average weekly wage and the inclusion of fringe benefits in that wage. However, at the oral argument to the Board, the parties agreed that the average weekly wage was $409.63, with fringe benefits of $20.48 per week for claimant's 401K and $.82 per week for claimant's life insurance, resulting in an agreed average weekly wage of $430.93 effective August 1, 2006. That wage will be used for the purposes of this award. The parties also acknowledged that the ALJ did not decide all the issues before him, as the determination of causation against claimant rendered several issues moot. The parties agreed that the Board should decide all issues and no remand to the ALJ was necessary should the Board reverse the ALJ on the issue of causation. The Board heard oral argument on May 15, 2009.

ISSUES

1. Did claimant suffer either an accidental injury or occupational disease which arose out of and in the course of her employment with respondent?

2. If claimant did prove either accidental injury or occupational disease, did claimant provide timely notice to respondent?

3. What is the amount of unpaid medical expense and is respondent required to pay same as either authorized or unauthorized medical expense?

4. What is the nature and extent of claimant's injuries and resulting disability?

FINDINGS OF FACT

Claimant began working for respondent as an ICU unit clerk on October 23, 2001. Claimant testified that she also occasionally provided direct patient care, doing CNA work. In approximately March 2003, claimant began having allergy symptoms, including swelling of her lips and claimant began breaking out in hives. Claimant also developed breathing difficulties. As a result of these symptoms, claimant went to her primary care doctor, Craig Nickel, M.D. She was then referred to board certified allergist/immunologist Bennett L. Radford, D.O. Dr. Radford diagnosed claimant with red eyes, nasal congestion, coughing and hives. Claimant's symptoms would start at work and sometimes with certain foods. Dr. Radford's initial diagnosis was a latex allergy. He testified that when people take latex gloves off, latex particles are put into the air or the latex is aerosolized. If a person gets a continuous exposure to latex in that type of setting, they can develop an allergy to the particles. He stated that a person in an ICU setting would get a continuous exposure to latex. In trying to diagnose claimant's condition, Dr. Radford used a percutaneous skin test method where allergens are introduced under the epidermis of the skin. A positive reaction indicates an allergic reaction. As the result of this testing, it was determined that claimant had positive reactions to some grasses, weeds, molds, dogs, house dust, corn pollen, smuts, rust, apples, cantaloupe, peaches, tomatoes, walnuts, barley, wheat, rye, celery, corn, lettuce, salmon, shrimp, beef, chicken, pork, turkey, eggs, brewer's yeast, and spice mix.

Dr. Radford acknowledged that there is no FDA approved skin test for latex. However, in order to attempt to test claimant's reaction to latex, he performed a skin test utilizing a metal device called a QUINTIP that penetrates the first layer of skin. He then placed two latex gloves over the QUINTIP and scratched claimant's skin through the

gloves. Dr. Radford stated that claimant had a definite allergic reaction to the latex. When asked about FDA approved tests for detecting latex allergies, Dr. Radford acknowledged that the RAST (radioallergosorbent test) blood test could be used to measure latex-specific IgE antibodies circulating in the blood. If a person has an IgE specifically associated with latex, that would be a positive test. Dr. Radford did not perform the RAST test, stating that the test had to be administered within 18 hours of the exposure or the test was not accurate. However, Dr. Radford did not provide the source of his 18-hour limit opinion.

At his first deposition, Dr. Radford testified that exposure to latex would cause a reaction on claimant and when the exposure is withdrawn, the symptoms would go away. He stated there would be no permanent impairment with the latex exposure, only a temporary reaction. He did recommend that claimant work in a latex-free environment. When Dr. Radford testified the second time, he rated claimant at 60 percent to the body pursuant to the fourth edition of the AMA *Guides*,[1] finding that claimant fell into either Class II or III. However, on cross-examination, he admitted claimant would fall into a Class II level of the AMA *Guides*[2] and have a 15 percent impairment to the whole body. Dr. Radford began claimant on a series of allergy injections identified as immunotherapy for claimant's other allergies. Dr. Radford stated that there was no immunotherapy treatment for a latex allergy.

Claimant last worked for respondent on July 7, 2006. She was terminated due to attendance problems. Claimant was unemployed until April 2007, when she began working at Alterra Assisted Living, which, at the time of the December 2007 deposition of claimant, was Brookdale Assisted Living. At the time of her deposition, claimant was also attending school at Hutchinson Community College studying for her GED. While at Hutchinson Community College, a teacher would use a dry erase marker. Claimant had reactions to the marker if she sat at the front of the class. Claimant also had an outbreak while eating at a McDonald's restaurant. Claimant stated that she thought the employees of McDonald's wore latex gloves while working. At the time of the regular hearing, claimant was working for Sterling Assisted Living which was a latex-free environment.

Claimant was referred by respondent to board certified pediatrician and board certified allergist Thomas F. Rosenberg, M.D., for an evaluation on June 25, 2008. Dr. Rosenberg agreed with Dr. Radford that a person exposed to a particular protein over and over could develop an allergic reaction to that protein. He identified Middleton's Allergy Principles & Practice, Volume 2, as an authoritative treatise on allergies. He referred to that publication as the Bible of allergy publications. Dr. Rosenberg testified that the accepted FDA standard for latex allergy testing is the blood test known as the RAST. The test finds specific antibodies in the blood associated with latex. He testified that

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] *Id.*

the IgE located in the memory cells in the blood remain forever. He disagreed with Dr. Radford's testimony regarding the 18-hour limit on the blood test's effectiveness. He also disagreed with Dr. Radford's skin scratch test method, stating that the skin scratch test was not recommended by the FDA. In claimant's case, the blood test was negative, indicating claimant did not have a latex allergy. Dr. Rosenberg determined that claimant did not have a latex allergy.

Teresa Brown, claimant's immediate supervisor with respondent, testified that claimant worked as a unit clerk. Ms. Brown did not remember seeing claimant doing CNA work. Additionally, Ms. Brown stated that the latex gloves were kept in holders in each patient's room along with a waste can for disposal of the gloves when a nurse left a room. This was to keep persons outside the patient rooms from being exposed to contaminants. While she did not go so far as to say no nurse ever deposited latex gloves at the unit clerk's desk, she did say it would be uncommon. No latex gloves were stored at claimant's desk. Ms. Brown knew of no job duties claimant performed which required that claimant wear latex gloves.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident

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[3] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2006 Supp. 44-501(a).

> occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

The ALJ determined that claimant had failed to prove a compensable claim for a latex allergy either through an accidental injury or occupational disease. The findings of Dr. Rosenberg were found to be more persuasive than those of Dr. Radford. Dr. Radford's failure to utilize the FDA-approved RAST blood test was determined by the ALJ to be a fatal flaw in his analysis of claimant's condition. The Board agrees with this determination. The skin scratch test utilized by Dr. Radford is not an accepted test method and the results of the test are not persuasive. The lack of a latex antibody found in the blood test convinces the Board that claimant did not have a latex allergy associated with her job with respondent. The denial of benefits by the ALJ is affirmed. This finding renders the remaining issues moot.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that she suffered a latex allergy either through an accidental injury or occupational disease while working for respondent. The denial of benefits is affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated January 22, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Dated this ____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge